Summary: The Defendant filed motions in limine to exclude evidence from the trial. The Court granted in part and denied in part the motions. The Court excluded the following: evidence that this action is the Plaintiff's sole remedy and that the Plaintiff is ineligible for workers' compensation; testimony by the Plaintiff's expert as to specific legal standards or legal conclusions; evidence that the Defendant's operating standards establish a legal standard of care; testimony by the Plaintiff's experts other than what is contained in the medical records; and evidence of subsequent remedial measures offered to prove negligence. The Court allowed the following: testimony by the Plaintiff's expert as to the existence and cause of the alleged malfunction, whether the Defendant failed to provide a reasonably safe place to work, and whether the Defendant was negligent; evidence of the Defendant's operating standards for uses other than establishing a legal standard of care; evidence of alternative or safer methods of work; and the causation testimony of the Plaintiff's treating physician.

Case Name: Neigum v. BNSF Railway Company
Case Number: 1-06-cv-26
Docket Number: 40
Date Filed: 4/10/08
Nature of Suit: 330

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Alexander D. Neigum,	)	
	)	**ORDER GRANTING IN PART AND**
Plaintiff,	)	**DENYING IN PART DEFENDANT'S**
	)	**MOTIONS IN LIMINE**
vs.	)	
	)	Case No. 1:06-cv-026
BNSF Railway Company,	)	
a corporation,	)	
	)	
Defendant.	)	

Before the Court are the Defendant's Motions in Limine filed on March 20, 2008. See Docket 28. The Plaintiff has not filed a response to the motions. The Court grants in part and denies in part the Defendant's motions in limine for the reasons set forth below.

I. BACKGROUND

On February 6, 2004, the plaintiff, Alexander Neigum, was working as a locomotive engineer for the defendant, BNSF Railway Company (BNSF). See Docket 1. Neigum contends that he attempted to open the front door to the locomotive "BNSF 6787," but was unable to do so. See Docket 29-2. Neigum contends that he then tried to open the door with two hands, but the door would not open. Neigum alleges that he then "lunged on it," the door opened approximately two inches, and he hurt his back in the process. Neigum filed a complaint against BNSF on March 28, 2006. See Docket 1. BNSF has filed six motions in limine.

II. LEGAL DISCUSSION

A. NEIGUM'S INABILITY TO RECEIVE WORKERS' COMPENSATION

BNSF contends that the jury should not be instructed or presented with evidence that this action is Neigum's sole remedy and that Neigum is ineligible for workers' compensation. An instruction that Neigum is not eligible for workers' compensation may prejudice BNSF if the jury is swayed to find for Neigum because of its concern that he may not be otherwise compensated for his injuries. See Schmitz v. Canadian Pac. Ry. Co., 454 F3d 678, 685 (7th Cir. 2006); Stillman v. Norfolk & W. Ry. Co., 811 F.2d 834, 838 (4th Cir. 1987) (holding that the plaintiff's "ineligibility for workers' compensation benefits was completely irrelevant to the issues presented in this case, and allowing the jury to consider such information could have prejudiced the Railroad."). In Schmitz, the Seventh Circuit Court of Appeals held that the "district court properly declined to instruct the jury that Schmitz was ineligble for workers' compensation payments." 454 F.3d at 685. The Court **GRANTS** BNSF's motion in limine that seeks to exclude an instruction or evidence that

this action is Neigum's sole remedy and that Neigum is ineligible for workers' compensation benefits. Neither party will be permitted at trial to argue to the jury that Neigum is not covered by workers' compensation or that Neigum's sole source of recovery is the Federal Employers' Liability Act (FELA) lawsuit.

B. EXPERT TESTIMONY OF MICHAEL O'BRIEN

BNSF contends that the testimony of Michael O'Brien, Neigum's expert witness, should be excluded. Rule 702 of the Federal Rules of Evidence sets forth the standard for expert testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 702 requires that the trial judge act as a "gatekeeper," admitting expert testimony only if it is both relevant and reliable. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993). The trial court is given broad discretion in its determination of reliability. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 142 (1999); Olson v. Ford Motor Co., 481 F.3d 619, 626 (8th Cir. 2007). However, the trial judge, as gatekeeper, should not invade the jury's role of deciding issues of credibility and determining the weight to be accorded such evidence. See Arkwright Mut. Ins. Co. v. Gwinner Oil Co., 125 F.3d 1176, 1183 (8th Cir. 1997).

The Eighth Circuit Court of Appeals has established three prerequisites that must be satisfied for expert testimony to be admitted under Rule 702:

> First, evidence based on scientific, technical, or other specialized knowledge must be useful to the finder of fact in deciding the ultimate issue of fact. This is the

> basic rule of relevancy. Second, the proposed witness must be qualified to assist the finder of fact. Third, 'the proposed evidence must be reliable or trustworthy in an evidentiary sense, so that, if the finder of fact accepts it as true, it provides the assistance the finder of fact requires . . . .'

Lauzon v. Senco Products, Inc., 270 F.3d 681, 686 (8th Cir. 2001) (internal citations omitted) (quoting 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 702.02[3] (2001)).

In the well-known case of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the United States Supreme Court held that the "general acceptance" standard articulated in Frye v. United States, 293 F. 1013 (D.C. 1923), was "not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence – especially Rule 702 – do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Daubert, 509 U.S. at 597. The Supreme Court has also held that the principles set forth in Daubert apply to all expert testimony. Kumho Tire, 526 U.S. at 141 ("We conclude that Daubert's general holding – setting forth the trial judge's general 'gatekeeping' obligation – applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."); accord Jaurequi v. Carter Mfg. Co., 173 F.3d 1076, 1082 (8th Cir. 1999).

BNSF argues that Michael O'Brien should not be allowed to give "legal opinions on legal standards." See Docket 29, p. 4. O'Brien made the following conclusions in his report:

> (1) Locomotive BNSF 6787 was "in use" at the time of Mr. Neigum's injury, and it should not have been in use with a cab door that failed to operate as intended. The defective cab door was the direct cause of Mr. Neigum's February 6, 2004, accident.
>
> (2) Locomotive BNSF 6787 was in violation of the Locomotive Inspection Act, § 20701, and the Locomotive Safety Standards, 49 CFR § 229.45.
>
> (3) BNSF failed to provide Mr. Neigum a reasonably safe place in which to

work, in violation of the Federal Employers' Liability Act.

(4) BNSF was negligent in their failure to identify and remedy the defective cab door on BNSF 6787 during performance of the Calendar-Day Inspection prior to Mr. Neigum's use of the locomotive. The BNSF post-accident report identified anomalies with the operation of the cab door which required repair.

See Docket 29, Ex. 1. BNSF contends that O'Brien made the following legal conclusions that should be excluded: BNSF's locomotive was "in use" under 49 C.F.R. § 229.21(a); BNSF's locomotive violated the Locomotive Inspection Act; BNSF violated FELA; and BNSF was negligent. BNSF also contends that O'Brien should not be allowed to testify because his opinions are not based on specialized knowledge and his opinions lack foundation. BNSF argues that a jury can understand the issues relating to the operation of a locomotive door without expert testimony.

Michael O'Brien is a railroad safety consultant who possesses the knowledge, background, training, education, and experience, along with foundation, necessary to provide expert witness testimony as to the existence and cause of the train's alleged malfunction. However, O'Brien does not possess the knowledge, background, training, education, and experience to express legal opinions. "Generally, an expert may not state his or her opinion as to legal standards nor may he or she state legal conclusions drawn by applying the law to the facts." Okland Oil Co. v. Conoco, Inc., 144 F.3d 1308, 1328 (10th Cir. 1998). It is well-established that matters of law are for the trial judge who has the responsibility to instruct the jury on the applicable law. Southern Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc., 320 F.3d 838, 841 (8th Cir. 2003).

The Court **GRANTS** BNSF's motion in limine but only to the extent that it seeks to exclude Michael O'Brien's testimony as to violations of specific legal standards or legal conclusions, i.e., whether the locomotive was in violation of the "Locomotive Inspection Act" or Locomotive Safety Standards as identified in O'Brien's report of April 16, 2007. It is clear from Eighth Circuit

precedent that O'Brien is prohibited from expressing an opinion concerning whether a specific federal law or safety standard was violated. O'Brien can certainly discuss the underlying facts, the factual basis for his opinions, and opine as to the existence and cause of the alleged malfunction. However, he is not allowed to make reference to specific laws or safety standards that he believes were violated. The Court will instruct the jury on the applicable law and the railroad safety standards which govern this case. An expert witness is prohibited from expressing an opinion as to whether the law/safety standard was violated. The Court **DENIES** BNSF's motion in limine to the extent that it applies to the existence and cause of the alleged malfunction, whether BNSF failed to provide a reasonably safe place to work, and whether BNSF was negligent. Those are appropriate topics or subject matter for an expert witness to opine on.

C. BNSF'S OPERATING STANDARDS

BNSF contends that testimony or argument that the door on locomotive "BNSF 6787" violated BNSF's own operating standards should be excluded because the "alleged standards do not establish a standard of care under FELA." See Docket 29, pp. 7-8. In Gagnier v. Bendixen, 439 F.2d 57, 62 (8th Cir. 1971), the Eighth Circuit explored the theory that a "railroad's duty of due care is governed by law and not by its private practices, and that the jury would be unduly confused by an inquiry as to whether the railroad was obeying its own rules rather than whether it was meeting its legal duty of due care." The Eighth Circuit concluded that "[n]egligence is to be measured by the legal obligation to use due care under the circumstances existing at the time of the accident." Id. In Ard v. Metro-North R. Co., 492 F. Supp. 2d 95, 99 (D. Conn. 2007), the court found that the railroad's safety and operating rules did not constitute legal standards. The court further found that the railroad safety expert who testified about the railroad's operating rules did not opine on legal

standards and, therefore, there was no error in allowing the expert to testify about the applicability of the railroad's safety and operating rules to the railroad's actions. Id. Expert testimony indicating that BNSF's operating standards establish a legal standard of care will not be allowed. The Court **GRANTS** BNSF's motion in limine to the extent that it seeks to exclude testimony or argument that BNSF's operating standards establish a legal standard of care but **DENIES** the motion in limine to the extent that it seeks to exclude all other testimony or argument concerning BNSF's operating standards.

D. REBUTTAL TESTIMONY TO DR. PETERSON'S IME REPORT

BNSF contends that Neigum should not be allowed to introduce testimony to rebut Dr. Greg Peterson's testimony or his IME report because Neigum has not disclosed the existence of any medical experts who will testify to such matters. The Court **GRANTS** BNSF's motion in limine to the extent that Neigum's experts are limited to testifying about what is contained in the medical records and Dr. Killen's letter of January 22, 2008.

E. SUBSEQUENT REMEDIAL MEASURES AND ALTERNATIVE METHODS

BNSF contends that Neigum and his experts should not be allowed to testify about any subsequent remedial measures taken by BNSF after Neigum's injury. Rule 407 of the Federal Rules of Evidence establishes:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence . . . . This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Rule 407 clearly establishes when evidence of subsequent remedial measures may be allowed into evidence and shall control the admission of evidence at trial. The Court **GRANTS** BNSF's motion in limine to the extent that it seeks to exclude testimony about subsequent remedial measures offered to prove negligence.

BNSF also contends that Neigum should not be allowed to argue or introduce evidence that BNSF could have provided alternative and safer methods of work. There are conflicting theories about whether evidence of alternative or safer methods of work on a job should be allowed into evidence. Compare Johnson v. Union Pac. R. Co., 2007 WL 2914886 at *2 (D. Neb. 2007) (denying the defendant's motion in limine to exclude evidence or argument that the plaintiff's work could have been made safer, agreeing with the plaintiff that evidence of a safer work method was relevant to determining whether the defendant "exercised reasonable care in providing the plaintiff with a safe place to work") with Stillman v. Norfolk & W. Ry. Co., 811 F.2d 834, 838 (4th Cir. 1987) (holding that the district court acted properly in sustaining the defendant's objection to the plaintiff's testimony about a safer, alternative way to do his job because "the question the jury had to decide was whether the Railroad had exercised reasonable care for the safety of Stillman, not whether the Railroad could have employed a safer method for installing gears."). The Court finds that evidence of a safer method of work is relevant to determining whether BNSF exercised reasonable care to provide a reasonably safe place to work. As such, BNSF's motion is **DENIED** at this stage.

F. DR. KILLEN'S TESTIMONY ON CAUSATION

BNSF contends that the testimony of Neigum's treating physician, Dr. Shelly Killen, should be restricted to her medical records and that her causation testimony should not be allowed. BNSF contends that a letter written by Dr. Killen on January 22, 2008, included an opinion on causation

that was not previously disclosed in the medical records. Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure requires an expert witness to provide a written report if the witness is retained or specially employed to provide expert testimony. However, a "treating physician is not considered an expert witness if he or she testifies about observations based on personal knowledge, including the treatment of the party." Davoll v. Webb, 194 F.3d 1116, 1138 (10th Cir. 1999); see Fed. R. Civ. P. 26(a)(2) advisory committee note (1993). The Court's "Order Re Amendments to Scheduling/Discovery Plan" established April 15, 2007, as the deadline for Neigum to provide the names of his expert witnesses and to complete reports. See Docket 14. The Court's order provided that "[t]reating physicians need not prepare reports, only qualifications, unless they will express opinions not reflected in the medical records." See Docket 14.

BNSF argues that, pursuant to the Scheduling/Discovery Plan, Dr. Killen was required, but failed, to prepare an expert witness report by the April 15, 2007, deadline because she intends to express an opinion on causation reflected in her letter of January 22, 2008, but not contained in the medical records. Dr. Killen's letter was apparently based on her earlier observations and treatment of Neigum but the timing and necessity of the letter is suspect.

The record reveals that BNSF arranged for an IME to be conducted by Dr. Greg Peterson in March 2007. It is clear and undisputed that Neigum's attorneys understood that there was a causation issue as disclosed in Dr. Peterson's detailed IME report dated March 19, 2007. See Docket 29-6, p. 15. Dr. Killen wrote a letter to Neigum's attorney on January 22, 2008, in which she expressed an opinion on causation. Discovery ended on February 1, 2008. It is obvious to the Court why the letter was issued.

Nevertheless, the Court in its discretion conditionally **DENIES** BNSF's motion in limine that seeks to exclude the limited causation testimony of Dr. Killen. To avoid any surprise attributable

to the discovery games that were played, the Court will allow counsel for BNSF the opportunity to depose Dr. Killen for the sole purpose of inquiring about her opinion on causation, with the following conditions[1]:

(1) the deposition will take place before the start of the trial (April 21, 2008) at a date and time convenient for all concerned;

(2) the deposition will be limited to exploring the factual basis for the opinion on causation offered by Dr. Killen in her letter dated January 22, 2008; and

(3) all "costs" associated with the taking of the deposition shall be borne by the plaintiff, i.e., court reporter fees and charges, long-distance telephone charges, and any fees that may be charged by Dr. Killen for her attendance at the deposition.

III. CONCLUSION

For the reasons set forth above, the Court **GRANTS** in part and **DENIES** in part BNSF's motions in limine. (Docket 28.) In summary, the Court **GRANTS** BNSF's motions in limine that seek to exclude the following evidence: that this action is Neigum's sole remedy and that Neigum is ineligible for workers' compensation; Michael O'Brien's testimony but only as to violations of specific laws or safety standards, or legal conclusions; that BNSF's operating standards establish a legal standard of care; rebuttal testimony to Dr. Greg Peterson's IME report to the extent that Neigum's experts are limited to testifying about information contained in the medical records and Dr. Killen's letter of January 22, 2008; and subsequent remedial measures offered to prove negligence.

The Court **DENIES** BNSF's motions in limine that seek to exclude the following evidence: Michael O'Brien's testimony to the extent that it applies to the existence and cause of the alleged

[1] The Court will leave it to the discretion of BNSF counsel as to whether there is a need to depose Dr. Killen and, if so, the method of the deposition, i.e., by telephone or in person. The Court has no objection to the deposition being taken after April 21, 2008, and during the trial if the parties can mutually agree on a date and time convenient for all.

malfunction, whether BNSF failed to provide a reasonably safe place to work, and whether BNSF was negligent; all other testimony or argument about BNSF's internal operating standards; testimony or argument that BNSF could have provided alternative and safer methods of work; and Dr. Killen's causation testimony as set forth in her letter of January 22, 2008.

The Court directs counsel to inform their clients and witnesses of this order and its prohibitions and allowances.

IT IS SO ORDERED.

Dated this 10th day of April, 2008.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court